

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 10-PM-08562-PEM
)	
ROBERT KELLY RUCK,)	ORDER GRANTING MOTION TO
)	REVOKE PROBATION¹
Member No. 215712,)	
)	
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

Based on alleged violations of three of the eight conditions of his probation, the Office of Probation of the State Bar of California (State Bar) filed the present motion to revoke the disciplinary probation that was imposed on respondent **ROBERT KELLY RUCK** in the Supreme Court’s January 8, 2010 order in *In re Robert Kelly Ruck on Discipline*, case number S177713 (State Bar Court case numbers 07-O-10806 and 08-O-14867 (consolidated)) (Supreme Court's January 8, 2010 order).

In its motion to revoke probation, the State Bar seeks to impose on respondent the entire one-year suspension that was previously imposed and then stayed in the Supreme Court’s January 8, 2010 order and to have that one-year suspension continue until respondent sends Katrina Johnson (Johnson) an itemized bill and informs her in writing that, if she objects to the

¹ Because the evidentiary hearing in this proceeding was held on December 8, 2010, the “new” Rules of Procedure of the State Bar effective January 1, 2011, are not applicable to this proceeding in the hearing department. Instead, the *former* Rules of Procedure of the State Bar continue to govern the proceeding in the hearing department. (See Rules Proc. of State Bar (eff. Jan. 1, 2011), Preface, item 1.)

bill, he will pay the fee to have the dispute resolved in a fee arbitration. The State Bar also requests that this court order respondent's involuntary inactive enrollment under Business and Professions Code section 6007, subdivision (d).²

The court finds, by a preponderance of the evidence, that respondent is culpable of two of the charged probation violations. Specifically, the court finds that respondent did not timely comply with the probation condition requiring him to contact the Office of Probation and schedule a meeting with his assigned probation deputy and that respondent did not timely comply with the probation condition requiring him to send Johnson an itemized bill and to resolve any fee dispute with Johnson in fee arbitration. For the reasons set forth *post*, the court will grant the State Bar's motion and recommend that the Supreme Court revoke respondent's probation and impose on him a new one-year period of stayed suspension and a new three-year period of probation on conditions that are substantially identical to the conditions previously imposed on respondent in the Supreme Court's January 8, 2010 order, including that respondent again be suspended for 30 days.

II. PERTINENT PROCEDURAL HISTORY

The State Bar filed the present motion to revoke respondent's probation on September 15, 2010. A copy of the motion was served on respondent on that same day by certified mail, return receipt requested, at respondent's latest address shown on the official membership records of the State Bar of California (official address). And, on October 27, 2010, respondent filed an Opposition to Motion to Revoke Probation and requested a hearing to cross-examine the State Bar's declarant.

² Unless otherwise indicated, all further references to "section" refer to provisions of the Business and Professions Code.

On November 8, 2010, the State Bar filed a motion to strike respondent's response and request for a hearing asserting that respondent's response was not timely filed and that there were errors in its proof of service. The court denied the State Bar's motion to strike on November 24, 2010.

A hearing was held on the State Bar's motion to revoke probation on December 8, 2010. At that hearing, the State Bar was represented by Supervising Attorney Terrie Goldade, and respondent appeared as his own counsel. The matter was submitted for decision after the hearing on December 8, 2010.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of facts are based on the testimony at the hearing; the declarations at the hearing, which the court now admits into evidence; and the documents admitted into evidence at the December 8, 2010 hearing.

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 3, 2001, and has been a member of the State Bar of California since that time.

B. Background

On August 21, 2009, respondent and the Office of the Chief Trial Counsel of the State Bar of California (hereafter OCTC) entered into a Stipulation Regarding Facts, Conclusions of Law, and Disposition in State Bar Court case numbers 07-O-10806 and 08-O-14867 (consolidated). In that stipulation, respondent stipulated to being placed on one year's stayed suspension and three years' probation with conditions, including a suspension for 30 days and until respondent paid \$3,962.50 in restitution to Alvin Rhodes (Rhodes) or, if appropriate, to the Client Security Fund.

On September 2, 2009, the State Bar Court filed an order approving the parties' stipulation and recommending that the Supreme Court impose the stipulated discipline on respondent. And the Supreme Court thereafter imposed the stipulated discipline on respondent in its January 8, 2010 order. A copy of the Supreme Court's January 8, 2010 order was promptly served on respondent at his official address as required by rule 8.532(a) of the California Rules of Court.

The 30-day-and-until suspension imposed on respondent in the Supreme Court's January 8, 2010 order began on February 7, 2010, and was terminated on March 22, 2010.

On February 9, 2010, Michael Angelo Kanterakis (Kanterakis), in his capacity as a probation deputy in the State Bar's Office of Probation, sent respondent an initial letter outlining the terms and conditions of respondent's probation under the Supreme Court's January 8, 2010 order. In that initial letter, Kanterakis stated that respondent was "**responsible for timely complying with each and every term and condition [of his probation] whether or not it is reflected in this letter and/or the [enclosed] Quarterly Report form.**" (Original bolding and underlying.) In the letter, Kanterakis also listed the eight conditions of respondent's probation together with respondent's deadlines for complying with the conditions. Probation condition number 1 in Kanterakis's letter is: "Contact Probation Deputy to Schedule Meeting." Moreover, in his letter, Kanterakis incorrectly lists respondent's deadline for complying with that probation condition as March 20, 2010 (the correct deadline was March 9, 2010).

Even though Kanterakis mailed his February 9, 2010 initial letter to respondent at respondent's then official address on U Street in Sacramento, California, respondent never received the letter.

On February 12, 2010, Attorney Robyn B. Bramson, who represents respondent, sent the State Bar proof that respondent had previously paid Rhodes the entire \$3,962.50 in restitution in December 2009.

On March 15, 2010, Attorney Bramson telephoned Kanterakis about respondent's probation. Even though Attorney Bramson stated that she represented respondent and had previously communicated with the State Bar on respondent's behalf, Kanterakis told Attorney Bramson that she was required to complete and provide to him an Office of Probation notice of counsel representation form signed by her and respondent.

Also, on March 15, 2010, Kanterakis mailed a second letter to respondent at respondent's then official address on U Street in Sacramento.

On either March 22 or 23, 2010, respondent telephoned Kanterakis who told respondent that, unless respondent provided proof that he complied with a probation condition regarding the arbitration of a fee dispute with Katrina Johnson or made restitution to Johnson and unless respondent conducted his probation-deputy meeting, respondent would be referred for probation violations. And, on March 29, 2010, respondent's scheduled meeting with Kanterakis took place. At that time, respondent was advised that he was overdue for providing proof of his compliance with the condition that involved sending Johnson an itemized bill.

Kanterakis's March 15, 2010 letter to respondent was returned to the State Bar on April 5, 2010, with the words "Not at This Address" written on it. However, in the interim, respondent changed his official address on March 30, 2010.

On May 4, 2010, Kanterakis called respondent at respondent's cell phone number (respondent gave Kanterakis his cell phone number at their March 29 meeting). On May 4, Kanterakis left respondent a voicemail message asking respondent to return his call. Respondent, however, did not return Kanterakis's call.

On June 16 and 30, 2010, Kanterakis again called respondent and left him voicemail messages asking respondent to return his call. Respondent, however, did not do so.

C. Charged Probation Violations

In its motion, the State Bar charges that respondent violated the following three conditions of his probation.

1. Probation-Deputy-Meeting Condition

Under respondent's probation-deputy-meeting condition of probation, respondent was required, within the first 30 days of probation (i.e., by March 9, 2010) to "contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of probation." Respondent admits that he did not contact the Office of Probation and make an appointment with his probation monitor until the 44th day of his probation. In other words, respondent admits that he was 14 days late in complying with his probation-deputy-meeting condition.

Bad faith is not a requirement for a finding of culpability in a probation violation matter; "instead, a 'general purpose or willingness' to commit an act or permit an omission is sufficient. [Citations.]" (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.) Accordingly, even though respondent may not have deliberately failed to contact the Office of Probation no later than March 9, 2010, the record still establishes, by a preponderance of the evidence, that respondent willfully violated his probation-deputy-meeting condition.

2. Quarterly-Reporting Condition

Under respondent's quarterly-reporting condition of probation, respondent is required, on every January 10, April 10, July 10, and October 10, to *submit*, to the Office of Probation, a written report stating, under penalty of perjury, inter alia, "whether Respondent has complied

with the State Bar Act, the Rules of Professional Conduct, and all the conditions of probation during the preceding calendar quarter.”

The State Bar charges that respondent violated his quarterly-reporting condition because it did not receive respondent’s report that was due on July 10, 2010, until July 12, 2010. As alleged in the motion to revoke probation, respondent admits that he dated his signature on the quarterly report on July 8, 2010, which was a Thursday; that he did not send the report until the next day -- July 9, 2010, which was a Friday; that, even though he sent the report to the State Bar by Express Mail, the report was not delivered to the State Bar until Monday, July 12, 2010, because July 10 was a Saturday and because the State Bar of California is not open on Saturdays.

The interpretation of respondent’s probation conditions is a question of law for the court; as such, the parties' subjective beliefs as to their meaning are irrelevant. (Cf. *In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813, 817; *In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 244, 252 & fn. 4.) In that regard, the State Bar has not cited any authority to support its charge that respondent violated his probation because the State Bar did not receive his July 10, 2010 quarterly report until July 12, 2010. And the court is unaware of any such authority. In short, the court holds that respondent timely submitted his July 10, 2010 quarterly report because the State Bar received it on July 12, 2010, which was the next business day after the Saturday upon which it was due. (Code Civ. Proc., §§ 12, 12a, 12b, 13; accord, Rules Proc. of State Bar, former rule 63(a).) Accordingly, no violation of respondent’s quarterly-reporting condition of probation has been established.

3. Fee-Arbitration Condition

Under respondent’s fee-arbitration condition of probation, respondent was required, within the first 30 days of his probation (i.e., by March 9, 2010), to send Johnson an itemized bill and a refund of any unearned portion of the \$500 advanced fee she paid him. Under this

condition, respondent was also required, inter alia, to inform Johnson that she was entitled to object to the itemized bill; to offer to arbitrate if Johnson objected to the itemized bill; to simultaneously provide written notice to the Office of Probation each time he made one of the multiple required communications with Johnson; and to provide the Office of Probation with proof of payment of any fee-arbitration award within 15 days of the payment.

As of the time the State Bar filed its motion to revoke probation, it had not received any proof that respondent had complied with any of the specific requirements of his fee-arbitration probation condition despite the State Bar's requests for such proof from respondent. Respondent credibly testified at the hearing that he was unaware of Johnson's whereabouts until September 2010 and that, once he learned of Johnson's whereabouts, rather than to initiate an arbitration proceeding, he refunded the entire \$500 advanced fee to Johnson via a \$500 cashier's check and that Johnson cashed or deposited that check on September 14, 2010. (See Exhibit A.)

Presumably, respondent's inability to locate Johnson would have established sufficient good cause to modify respondent's fee-arbitration condition or to grant respondent an extension of time. Respondent, however, never sought to modify the condition or an extension of time to perform based on his inability to locate Johnson. Thus, respondent's inability to locate Johnson is not a defense to the charged probation violation. (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 868 & fn. 4.)

Again, the State Bar need not establish that respondent violated his fee-arbitration condition in bad faith. (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 536.) "Disciplinary probation serves the critical function of protecting the public and rehabilitating the attorney. [Citation.] The importance of these goals makes distinctions between substantial and insubstantial or technical violations of probation inappropriate. It is the importance of the goals, not just the particular probation condition at issue, that makes such distinctions inappropriate.

[Therefore,] for the purpose of determining culpability, ‘it is misguided’ to distinguish between substantial and other forms of compliance. [Fn. Omitted.] [Citation.]” (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 652.)

In sum, the record establishes, by a preponderance of the evidence, that respondent willfully violated his fee-arbitration condition of probation because he did not send Johnson an itemized bill for the \$500 advance fee by March 9, 2010.

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Mitigation

There are several mitigating circumstances in this case.

First, respondent displayed candor and cooperation during this State Bar Court proceedings. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)(v) (standard).)

Second, on his own initiative and long before the State Bar filed the motion to revoke his probation, respondent belatedly contacted the Office of Probation on March 23, 2010, and scheduled an appointment with his probation deputy. (Std. 1.2(e)(vii).)

B. Aggravating Circumstances

There is one aggravating circumstance. Respondent has a prior record of discipline. (Std. 1.2(b)(i).) As noted *ante*, in its January 8, 2010 order, the Supreme Court imposed the discipline to which respondent stipulated in State Bar Court case numbers 07-O-10806 and 08-O-14867 (consolidated). That stipulation establishes that, in one client matter (the Johnson client matter), respondent failed to keep his client reasonably informed of significant developments in the client’s matter in willful violation of section 6068, subdivision (m); respondent improperly withdrew from representation without taking reasonable steps to avoid reasonably foreseeable harm to his client in willful violation of State Bar Rules of Professional

Conduct, rule 3-700(A)(2),³ and respondent failed to render an appropriate accounting to the client regarding \$500 in advanced fees the client paid respondent in willful violation of rule 4-100(B)(3). The stipulation also establishes that, in a second client matter (the Rhodes client matter), respondent failed to account to Rhodes for the \$7,000 in advanced fees that Rhodes paid respondent.

The State Bar requests that the court find, as uncharged-misconduct aggravation, that respondent is also culpable on two uncharged probation violations based on an alleged misrepresentation in respondent's July 10, 2010 quarterly report and respondent's failure to timely provide the Office of Probation with proof that he paid \$500 to Johnson. The court, however, declines to do so. The State Bar knew or clearly should have known of these two alleged probation violations well before it filed the present motion to revoke probation. Accordingly, these two alleged violations should have been charged in the present motion to revoke probation. (See Rules Proc. of State Bar, rule 560.) For the same reason, the court declines to find uncharged-misconduct aggravation based on respondent's failures to telephone Kanterakis in response to Kanterakis's voicemail messages.

V. DISCUSSION

Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as "the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession." In addition, standard 1.6(b) provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

³Unless otherwise indicated, all further reference to rules are to the State Bar Rules of Professional Conduct.

Protection of the public and rehabilitation of the attorney are the primary goals of disciplinary probation. (*In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, 452; *In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 298.) In determining the appropriate level of discipline, the court must consider the “total length of stayed suspension which could be imposed as an actual suspension and the total amount of actual suspension earlier imposed as a condition of the discipline at the time probation was granted.” (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 540.)

The extent of the discipline to recommend is dependent, in part, on the seriousness of the probation violation and respondent’s recognition of his misconduct and his efforts to comply with the conditions. (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 540.) Furthermore, “[t]he violation of a probation condition significantly related to the attorney’s prior misconduct merits the greatest discipline, especially if the violation raises a serious concern about the need to protect the public or shows the attorney’s failure to undertake steps toward rehabilitation.” (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 151.) “The degree of discipline ultimately imposed must, of necessity, correspond to some reasonable degree with the gravity of the misconduct at issue.” (*In re Nevill* (1985) 39 Cal.3d 729, 735.)

As noted *ante*, the State Bar recommends, inter alia, that respondent’s probation be revoked and that the entire one-year suspension that was previously stayed by the Supreme Court’s January 8, 2010 order be imposed on respondent. The court disagrees with the State Bar’s recommendations in light of the two probation violations established by the record and respondent’s “efforts to comply with the conditions.” In addition, there are several mitigating circumstances in this matter, but only a single aggravating circumstance. On balance, the court concludes that the appropriate level of discipline is to revoke respondent’s probation and to again

place respondent on a year's stayed suspension and three years' probation on conditions that are substantially identical to those originally imposed on respondent in the Supreme Court's January 8, 2010 order. (See *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 705.)

Finally, the court declines to involuntarily enroll respondent as an inactive member of the State Bar under section 6007, subdivision (d). If the court were to enroll respondent inactive under section 6007, subdivision (d), respondent's 30-day suspension will have begun and ended before the record in this proceeding is transmitted to the Supreme Court. As a consequence, this court's recommendation that respondent be actually suspended for 30 days would be effectively unreviewable by the Supreme Court. There is no evidence of any immediate public-protection concerns that would justify sending such an "unreviewable" discipline recommendation to the Supreme Court. (*In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 531-532.)

VI. ORDER GRANTING MOTION TO REVOKE PROBATION & DISCIPLINE RECOMMENDATION⁴

The court orders that the State Bar's September 15, 2010 motion to revoke the probation of **ROBERT KELLY RUCK** is GRANTED. Furthermore, the court hereby recommends to the Supreme Court that the probation imposed on **ROBERT KELLY RUCK** pursuant to the Supreme Court's January 8, 2010 order in case number S177713 (State Bar Court case numbers

⁴ The court does *not* recommend that respondent be ordered to again take and pass a professional responsibility examination because he was ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) in the Supreme Court's January 8, 2010 order. The provision in the Supreme Court's January 8, 2010 order requiring respondent to take and pass the MPRE will remain in effect even if his probation is revoked in this proceeding. Accordingly, if respondent fails to take and pass the MPRE within the time prescribed in the Supreme Court's January 8, 2010 order, respondent will be suspended from the practice of law until he provides proof that he has passed the examination (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8).

07-O-10806 and 08-O-14867 (consolidated)) be revoked; that the previous stay of execution of the one-year suspension in that order be lifted; and that **ROBERT KELLY RUCK** again be suspended from the practice of law in the State of California for one year; that execution of this new one-year suspension be stayed; and that **ROBERT KELLY RUCK** be placed on a new three-year period of probation on the following conditions:

1. Ruck is suspended from the practice of law for the first 30 days of probation;
2. Ruck must comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all the conditions of this probation;
3. Within ten (10) days of any change, Ruck must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar (Office of Probation), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;
4. Within thirty (30) days after the effective date the Supreme Court order in this proceeding, Ruck must again contact the Office of Probation and again schedule a meeting with Ruck's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, Ruck must meet with the probation deputy either in-person or by telephone. During the period of probation, Ruck must promptly meet with the probation deputy as directed and upon request;
5. Ruck must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, Ruck must state whether he has complied with the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all conditions of probation during the preceding calendar quarter. Ruck must also state whether there are any proceedings pending against him in the State Bar Court and, if so, the case number and current status of that proceeding. If the first report would cover less than thirty (30) days, that report must be submitted on the next quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the period of probation and no later than the last day of probation;

6. Unless Ruck has successfully done so within last two years before the effective date of the Supreme Court order in this proceeding, Ruck must, within the first year of probation, attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of his successful completion of that school to the State Bar's Office of Probation. The program is offered periodically at either 180 Howard Street, San Francisco, California 94105-1639 or at 1149 South Hill Street, Los Angeles, California 90015-2299.

Arrangements to attend the school must be made in advance by calling (213) 765-1287 and by paying the required fee. This condition of probation is separate and apart from Ruck's Minimum Continuing Legal Education ("MCLE") requirements; accordingly, he is ordered not to claim any MCLE credit for attending and completing this school. (Accord, Rules Proc. of State Bar, rule 3201.)

7. Within the first two years of probation, Ruck must complete at least six hours of MCLE courses in legal ethics. This probation condition is separate and apart from Ruck's MCLE requirements; accordingly, Ruck is ordered not to claim any MCLE credit for completing these six hours of courses. (Accord, Rules Proc. of State Bar, rule 3201.)
8. Subject to assertion of applicable privileges, Ruck must answer fully, promptly, and truthfully any inquiries of the Office of Probation and any probation monitor assigned under these conditions which are directed to Ruck personally or in writing relating to whether he is complying or has complied with the probation conditions; and
9. Ruck's new three-year period of probation will begin on the effective date of the Supreme Court order in this probation revocation proceeding. At the expiration of this new three-year period of probation, if Ruck has complied with all the conditions of probation, the new one-year period of stayed suspension will be satisfied.

VII. COSTS

Finally, the court recommends that costs be awarded to the State Bar of California in accordance with Business and Professions Code section 6086.10 and that those costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: January 7, 2011.

PAT McELROY
Judge of the State Bar Court